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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1961.

No. 117

PEERLESS WEIGHING AND VENDING MACHINE CORPORATION, A CORPORATION,

*Appellant,*

*vs.*

PUBLIC BUILDING COMMISSION OF CHICAGO, A MUNICIPAL CORPORATION,

*Appellee.*

ON APPEAL FROM THE THREE JUDGE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

## REPLY TO APPELLEE'S MOTION TO DISMISS.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1961.

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**No. 968**

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PEERLESS WEIGHING AND VENDING MACHINE CORPORATION, A CORPORATION,

*Appellant,*

*vs.*

PUBLIC BUILDING COMMISSION OF CHICAGO, A MUNICIPAL CORPORATION,

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ON APPEAL FROM THE THREE JUDGE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

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## REPLY TO APPELLEE'S MOTION TO DISMISS.

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The argument in support of the Appellee's motion to dismiss is specious. This Court has never held that the time within which a direct appeal from the judgment of a three judge court in a case involving the constitutional validity of a State statute must be taken pursuant to the provisions of 28 U. S. C. 2101(b) rather than 2101(c). As far as can be determined, this Court has never been faced with this question. The cases advanced by Appellee in support of its motion demonstrate only that in each

of those cases the respective appellants assumed that the time period was controlled by 28 U. S. C. 2101(b). In none of those cases was this Court required to decide the precise question of timeliness.

We respectfully submit that the law, as it is now written, is clear that appellants have ninety days from the entry of a three judge court decree in a proceeding involving the constitutional validity of a State statute within which to prosecute their appeal.

Prior to the enactment of the Judicial Code of June 25, 1948, the time for taking an appeal to this Court was governed by the provisions of former 28 U. S. C. 350 (1940 Ed.). These provisions stated the general rule that applications for appeals to this Court were to be made within three months of the entry of the final judgment or decree. There were, however, other special statutes which reduced the time limitations for appeals in certain types of cases. The Expediting Act of 1903 provided for reduced time limitations in certain cases. An appeal under that Act had to be brought within sixty days (58 Stats. 272). It was limited to actions brought by the United States under the Anti-Trust laws (15 U. S. C. 28, 29), the Interstate Commerce Act (49 U. S. C. 44, 45), the Communications Act of 1934 (47 U. S. C. 401 (d)) and other federal statutes which incorporated the Expediting Act. In each instance, the Congressional intent was explicit. In addition to this Act, the Judicial Code prior to 1948 provided that an appeal from an adverse interlocutory order entered in an injunctive proceeding to challenge an order of the Interstate Commerce Commission had to be taken within thirty days. An appeal from a final order in that type of proceeding had to be taken within sixty days (28 U. S. C. 47, 47(a) (1940 Ed.)). These special appeal Acts were never applied to a three judge court proceeding which involved the constitutional validity of a State statute. Appeals from

such three judge court decisions were controlled by the three month provision of former 28 U. S. C. 350 (1940 Ed.). The successor statute in the 1948 Judicial Code, namely, 28 U. S. C. 2101(c), re-enacts the provisions of the prior statute and merely changes it from a three month period to ninety days. In all other respects it re-enacts the prior procedure.

It must be noted that prior to 1948 the reduced time periods for an appeal to this Court were clearly an exception to the general rule of three months. Furthermore, this reduction of the time period was applicable to certain cases which were exclusively federal in nature, such as actions under the Anti-trust laws, Interstate Commerce Act, and the like. Congress apparently deemed it necessary to expedite the final judicial determination of this explicitly designated and exclusively federal business. These exceptional provisions never controlled an appeal from a decision of a three judge court involving a constitutional attack upon a State statute. Appeals in this type of proceeding fell within the purview of the three month provision of 28 U. S. C. 350 (1940 Ed.).

There is no indication that by its enactment of the Judicial Code of 1948 Congress intended to extend the reduced time limitation contained in the Expediting Act of 1903 to actions involving the constitutionality of State statutes. To so hold would represent a radical departure from the traditional purpose of the Expediting Act of 1903, namely, the prompt and early disposition of those matters arising out of the aforesaid Federal statutes which are within the exclusive jurisdiction of the federal courts. It would seem that if Congress did so intend, such intention would be clearly expressed in the Act.

No such language is found in subsection (b) of Title 28 of the United States Code, Section 2101. That section

refers to a "direct appeal to the Supreme Court, which is authorized by law from a decision of a *district court* in any civil action, suit or proceeding, etc." The use of the phrase "district court" has a precise meaning. Section 132(b), Title 28 of the United States Code specifies that "Each district shall consist of a district judge." A district court, then, is a court over which a district judge presides. In all legislation relative to actions which must be heard by three judges, Congress consistently uses the phrase "district court of three judges." (28 U. S. C. Sections 2281-2284.) In the Congressional provision for a direct appeal to this Court, again the phrase "district court of three judges" is used (28 U. S. C. 1253). In subsection (a) of U. S. C. 2101, Congress expressly refers to other statutory enactments which use the phrase "district court of three judges." It is self-evident from reading the statutes that a district court of three judges is different from a "district court"; it is not a district court. In fact a three judge court may be constituted with two judges from the Court of Appeals together with a district judge (28 U. S. C. 2284(1).

A three judge court is truly a special court. This Court has so held, *Ex Parte Bransford*, 310 U. S. 354. The statute itself distinguishes the two types of courts. They are not synonymous.

It is a fact that under present procedure a direct appeal to this Court can be had in a case held by a single district judge (15 U. S. C. 28, 29; 49 U. S. C. 44, 45). It is apparent that subsection (b) applies only to those special federal cases which were formerly controlled by the Expediting Act of 1903. There is no indication that it was broadened to include the "State cases," *i. e.* cases challenging local action under state statutes, to which the Expediting Act never applied.

This proceeding concerns Appellant's fundamental constitutional rights and it presents questions of national importance. Its right to have an adverse decision reviewed by this Court should not arbitrarily be denied by Appellee's strained construction of the statute. To adopt the Appellee's contention, one must ascribe a broader application of the the Expediting Act of 1903 than Congress intended. One must extend that Act beyond the specified number of federal cases to which it traditionally applied, namely, actions by the Federal Government under the Anti-Trust Laws, the Interstate Commerce Act, and like and similar statutes. In the absence of an express indication that Congress intended so to do, the Appellee's contention should not be sustained and its motion to dismiss should be denied.

Respectfully susbmitted,

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